Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1996

KEVIN KIENZLE,

Petitioner,

v.

ENGLEWOOD DISPOSAL CO., INC. and LIBERTY MUTUAL,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Florida

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether Section 440.02(1), Florida Statutes (1994), which allows workers' compensation benefits to physically disabled workers but denies benefits to psychiatrically disabled workers, violates the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*?

PARTIES TO THE PROCEEDING

The Petitioner, KEVIN KIENZLE, is a resident of Sarasota, Sarasota County, Florida. Petitioner was the Petitioner before the Supreme Court of Florida; the Appellant before the District Court of Appeal, First District, State of Florida; and the Claimant before the Judge of Compensation Claims, District M-North, State of Florida.

Respondent, ENGLEWOOD DISPOSAL COMPANY, INC., is a Florida corporation licensed to do business in the State of Florida. The Respondent, LIBERTY MUTUAL INSURANCE COMPANY, is a Massachusetts corporation licensed to do business as an insurance company in the State of Florida. Respondents were the Respondents before the Supreme Court of Florida; the Appellees before the First District Court of Appeal, State of Florida; and the Employer and Carrier, respectively, before the Judge of Compensation Claims, District M-North, State of Florida.

There are no other parties to this action. However, since the constitutionality of Florida Statute Section 440.02(1) (1994) is drawn into question, 28 U.S.C. § 2403(b) may apply to this action and the Attorney General for the State of Florida has been duly served and notified of this proceeding.

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OPINIONS BELOW

The order of dismissal of the Florida Supreme Court that gives rise to this petition is *Kienzle v. Englewood Disposal Co., Inc.*, Case No. 88,746, dated August 20, 1996. The Per Curiam affirmation of the Florida First District Court of Appeal is *Kienzle v. Englewood Supply Co., Inc.*, Case No. 95-4179, dated July 18, 1996. These unpublished decisions and the unpublished order of the Judge of Compensation Claims, District "M" North, State of Florida are reprinted hereto in the Appendix at pages App. 1-App. 6.

BASIS FOR JURISDICTION

The Supreme Court of Florida denied review of this matter on August 20, 1996. This court has jurisdiction to review a decision of a state court of last resort pursuant to 28 United States Code Section 1257.

STATUTORY PROVISIONS INVOLVED

Florida Statute § 440.02(1) (1994) provides in pertinent part that:

> "Accident" means only an unexpected or unusual event or result that happens suddenly. A mental or nervous injury due to stress, fright, or excitement only, or disability . . . is not an injury by accident arising out of the employment.

The Americans with Disabilities Act, Title I, 42 U.S.C. § 12112 provides, in pertinent part:

(a) GENERAL RULE. – No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

(b) CONSTRUCTION. – As used in subsection (a), the term "discriminate" includes –

(1) limiting, segregating, or classifying a job applicant or employee in such a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;

(2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this title (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs);

(3) utilizing standards, criteria, or methods of administration –

(A) that have the effect of discrimination on the basis of disability; or

(B) that perpetuate the discrimination of others who are subject to common administrative control;

The Americans with Disabilities Act, Title II, 42 U.S.C., § 12131 provides in pertinent part that:

SEC. 201 DEFINITION

(a) PUBLIC ENTITY. – The term "public entity" means –

a public entity shall not impose or apply eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any service, program, or activity, unless such criteria can be shown to be necessary for the provision of the service, program, or activity being affected.

(b) QUALIFIED INDIVIDUAL WITH A DISABILITY. – The term "qualified individual with a disability" means –

an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication or transportation barriers, or the provisions of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

The Americans with Disabilities Act, Title II, 42 U.S.C., § 12132 provides in pertinent part that:

SEC. 202 DISCRIMINATION

"Subject to the provision of this subchapter, no qualified individual with a disability, shall by reason of such disability, be barred from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."

STATEMENT OF THE CASE

The Petitioner, Kevin Kienzle, had an on-the-job accident which resulted in psychiatric disabilities. Petitioner applied for Florida workers' compensation benefits. These benefits were denied to him by the Respondents, his employer and their insurance carrier. Workers injured on the job in the State of Florida are entitled to workers' compensation benefits if they are physically disabled, without accompanying physical injury, from an on-the-job accident. However, if they are only psychiatrically disabled from the on-the-job accident, they are denied disability benefits.

This matter was heard before the Judge of Compensation of Claims, District M, State of Florida, and an Order denying benefits was entered by the Judge on October 27, 1995. A timely appeal was taken to the Florida First District Court of Appeal and was *Per Curiam Affirmed*. A timely petition for certiorari was filed before the Supreme Court of Florida and certiorari was denied on August 20, 1996.

REASONS FOR GRANTING THE WRIT

The issue involved in this petition is for all intent and purposes a matter of first impression since state courts appear reluctant to disregard ancient precedent even when faced with contrary commands within recent federal law. See, *e.g., Soileau v. Guilford of Maine, Inc.*, 928 F. Supp. 37 (D. Maine 1996); *Muller v. Automobile Club of So. Calif.*, 897 F. Supp. 1289 (S.D. Calif. 1995) and *Mobley v.*

Bd. Regents of Univ. System of Georgia, 924 F. Supp. 1179 (S.D. Ga. 1996).

This petition presents the question of whether federal civil rights mandates as developed in the Americans With Disabilities Act (ADA) are applicable to state workers compensation programs when the issue is the more complex one of mental rather than physical incapacity, and the denial of benefits to psychiatrically disabled individuals denies Petitioner the individualized assessment mandated in *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 107 S. Ct. 1123, 94 L.Ed.2d 307 (1987). The answer would appear to be simple enough, yet many states, including Florida, have refused to upgrade tests or standards to determine on-the-job mental injury.

Under 42 U.S.C. § 12102(2), a "disability" is: (1) "a physical or mental impairment that substantially limits one or more of the major life activities; (2) "a record of such an impairment"; or (3) "being regarded as having such an impairment." For example, a person is considered an individual with a disability under the ADA when a person's mental impairment substantially limits the major life activity of working. 29 C.F.R. § 1630.2(i) (1995) Mental impairments under ADA are dealt with in detail in the EEOC Compliance Manual, however there are examples of mental impairments that EEOC would recognize as coming within the ambit of ADA: manic depression, schizophrenia, organic brain syndrome, emotional or mental illness and depression. H.R. Rep. No. 485, 101st Cong., 2d Sess. pt. * 2 at 28, 51. The ADA regulations adopt section 504 of the Rehabilitation Act's definition of a physical or mental impairment:

> (1) any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine; or (2) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illnesses, and specific learning disabilities. 29 C.F.R. § 1630.2(h) (1995).

Admittedly, in such an amorphous area as depression and other types of mental impairment there is a question of whether such depression or stress is an actionable disability under ADA.

There is some question whether or not stress is considered a disability under the ADA. The EEOC has indicated that stress and depression are conditions that might or might not be impairments, depending whether these conditions result from a "documented physiological or mental disorder." [Title I, Equal Employment Opportunity Commission Technical Assistance Manual of Employment Provisions of the Americans with Disabilities Act (1992) at II-3.] A person suffering from general stress because of job or personal life pressures would not be considered to have an impairment. [*Id.*, at II-3.] However, and herein is the crux of petitioner's argument, if the person is diagnosed by a psychiatrist as having an identifiable stress disorder, he or she would have an impairment that might be considered a disability. Yet, in Florida, courts are not permitted to take this final factual

step. Consider the conclusion of the judge of compensation claims in the present case:

> 15. . . . the law is clear: a claimant who suffers no physical injury is not entitled to Workers' Compensation benefits for psychiatric injuries, and compensation for such injuries will only be available if the claimant establishes that the mental or emotional injury is a direct result of a physical injury. *Nationwide v. McGee*, 597 So.2d 357 (Fla. 1st DCA 1992).
>
> 16. By the Claimant's own admission, he suffered no physical injury as a result of the incident of November 26, 1994.
>
> 17. Based on the clear language of the statute in 440.02(1), the Supreme Court's upholding of that statutory provision, and the Claimant's testimony that there was no physical injury, it is clear that there was no accident. *Kienzle v. Englewood Disposal*, Claim No: 285-58-6200, *ORDER* p.4.

Accordingly, a plaintiff establishes a prima facie case under the employment discrimination subsection of the ADA when the plaintiff demonstrates "(1) that he [or she] is a disabled person within the meaning of the ADA; (2) that he [or she] is qualified, that is, with or without reasonable accommodation (which he [or she] must describe), he [or she] is able to perform the essential functions of the job; and (3) that the employer terminated him [or her] because of the disability." However, in Florida these steps are precluded.

Consider the present case wherein the Petitioner operated a vehicle for a disposal company. On the rear of the vehicle is a bucket that extends approximately eight

inches beyond each side of the vehicle's cab. On November 26, 1994, while in the course of his employment, Petitioner struck a pedestrian with the extended bucket, fatally injuring the pedestrian. Petitioner did not seek workers' compensation benefits for physical injuries nor did he claim any physical injuries. However, he did seek benefits for the mental injuries that he sustained. His employer and its carrier filed a Notice of Denial. The employer/carrier relied upon Fla. Stat. 440.02(1) 1994, which defines an "accident as a mental or nervous injury due to stress, fright or excitement only . . . is not an injury arising out of the employment." Since the claimant did not sustain a physical injury, the employer/carrier denied relief.

The Judge of Compensation Claims also relied on Fla. Stat. 440.02(1) in denying coverage. The judge noted that this statute has historically been held to necessitate a physical injury. See *Superior Mill Work v. Gabel*, 89 So.2d 794 (Fla. 1956). This position is correct under present Florida case law. See *Richard v. Greenshields Securities, Inc.*, 552 So.2d 1099 (Fla. 1989); and *Arnold v. State*, 610 So.2d 585 (Fla. 1st DCA 1992). Ultimately, the Judge declared that mental injuries could only be compensated if it was established that the mental or emotional injury was a direct result of a physical injury. See also, *Nationwide v. McGee*, 597 So.2d 357 (Fla. 1st DCA 1992). Relying on the statute, the Supreme Court's interpretation of the statute, and claimant's testimony, it was held that there was no accident; hence, no compensation.

Claimant also asserted that the Florida Workers' Compensation Act violated the ADA. As to claimant's

ADA claim, the Judge cited recent case law for the proposition that Florida Workers' Compensation law is not in conflict with the ADA. See *Barry v. Burdines*, 675 So.2d 587 (Fla. 1996) and *Barry v. Burdines*, 667 So.2d 241 (1st D.C.A. 1995).

The precedent relied upon in Florida, as cited by the compensation judge in *Superior Mill Work v. Gabel*, 89 So.2d 794 (Fla. 1956) involved a mill worker who had suffered from varicose veins in both his legs. While at work, he was struck on his right ankle by a stack of wood. This accident aggravated his condition; he later developed thrombophlebitis and required hospitalization. The thrombophlebitis developed a blood clot, which was successfully treated. At his disability hearing, the claimant was found to be apathetic and depressed. He was also found to be fearful that his job, which involved standing for long periods of time, would aggravate his condition and cause another blood clot. The Deputy Commissioner and FWI Commission found that the anxiety neurosis was a compensable injury under the Florida Workers' Compensation Act.

The Florida Supreme Court addressed the causal connection between the neurosis and the actual industrial injury. The Court noted that in workers' compensation cases the general standard was "the neurosis [is] the direct and immediate result of the industrial injury." *Id.*, at 795. It stated that "[t]he causal connection with the accident must be proven by clear evidence, for such a neurosis may arise from any number of causes . . . [t]he causal connection with an accident must not be remote." *Id.* (quoting *Thompson v. Railway Express Agency*, Mo. App. 1951, 236 S.W. 2d 36, 39.) In spite of language in ADA to

the contrary, *Gabel* is still the position of the courts in workers' compensation claims.

Indeed, in *Gabel*, the Court found that the claimant's neurosis did not develop until well after the accident. Also, the medical evidence was unclear whether or not the thrombophlebitis was indeed a result of the accident. In fact, the ailment that the claimant feared, the blood clotting, could not possibly have resulted from an industrial injury. Thus, no causal connection was established. Certiorari was granted and the order of the Deputy Commissioner was quashed.

At inception, Florida's Workers' Compensation laws were aimed at relieving the hardships to workers created by on-the-job injuries. *McLean v. Mundy*, 81 So.2d 501 (Fla. 1955), *Florida Game & Fresh Water Fish Commission v. Drivers*, 65 So.2d 723 (Fla. 1953). The laws were a reasonable alternative not only to existing common law rights, but also to statutory schemes in place when the constitution of 1968 was adopted. *Acton v. Fort Lauderdale Hospital*, 440 So.2d 1282 (Fla. 1983), and *Sasso v. Ram Property Management*, 431 So.2d 204 (Fla. 1st DCA 1983), *aff'd*, *Sasso v. Ram Property Management*, 452 So.2d 932 (Fla. 1984). Yet *Gabel* causes an entire class of disabled workers (mental) to be discriminated against where physical injury is not evident as a causal factor.

Enter the ADA. The ADA in strong terms provides that no employer:

> shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to . . . the hiring,

> advancement or discharge of employees. . . . 42 U.S.C. § 12112.

Title I of ADA prohibits discrimination in employment on the basis of a disability. [Pub. L. 101-336, § 108 (July 26, 1990)]

Title II is the public entity provision of ADA. 42 U.S.C. §§ 12141-12165. Title II incorporates the "nondiscrimination principles" of the Rehabilitation Act; it extends the principles to state and local governments. *Helen L. v. DiDario*, 46 F.3d 325, 329 (3d Cir. 1995). Congress concluded that "public officials historically have been among the major perpetrators of segregated services in this country." Cited in *Hutchinson v. United Parcel Service, Inc.*, 883 F. Supp. 379 at 387 (N.D. Iowa 1995). One author analogizes the present state of public official discrimination against the disabled to the "Jim Crow laws" of old. See Timothy M. Cook, *The Americans With Disabilities Act: The Move To Integration*, 64 Temp. L.Rev. 393, 400, 416 (1991) cited in *Hutchinson, supra.*

> [h]istorically, society has tended to isolate and segregate individuals with disabilities, and . . . such forms of discrimination. . . . continue to be a serious and pervasive social problem. 42 U.S.C. § 12101(a)(2).

See *Hutchinson, supra* and *Helen L., supra* at 332.

With regard to the history of unequal treatment of persons with disabilities, Congress finds it to be 'real and compelling'. 42 U.S.C. 12101(a)(7). Furthermore, Congress defines individuals with disabilities as a discrete and insular minority who have been faced with restrictions and limitation, subjected to a history of purposeful

unequal treatment, and relegated to a position of powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotyped assumptions not truly indicative of the individual ability of such individuals. 42 U.S.C. § 12101 (*Congressional Findings and Purposes*)

It would seem that most courts agree that the ADA protects individuals with disabilities from discrimination in almost every aspect of their lives. Most courts agree that the intent of the ADA is to prevent day-to-day discrimination against disabled persons by legislating a comprehensive approach on societal attitudes about disabled persons or physical barriers. Most courts agree that the ADA provides equal opportunity and equal treatment to individuals with disabilities, and in an effort to achieve the equality, the ADA imposes on entities subject to its provisions not only an obligation not to discriminate because of a disability, but also an obligation to provide reasonable accommodation for the individual's disability, unless providing such accommodation would impose undue hardship. See, *e.g. Martin v. Voinovich* 840 F. Supp. 1175 (S.D. Ohio 1993), *Wood v. County of Alameda*, 875 F. Supp. 659 (N.D. Calif, 1995); *Harding v. Winn-Dixie Stores, Inc.*, 907 F. Supp. 386 (M.D. Fla. 1995). Where courts *depart* is at the point in a record in which the court must find discrimination. That is where *Gabel* enters the picture. *Gabel* mandates state discrimination where the illness in question (mental) cannot be linked to a physical injury. Herein lies the exact location for judicial guidance. *Hutchinson supra* at 393.

The ADA is unquestionably the most sweeping piece of civil rights legislation since the Civil Rights Act of 1964

because, for the first time, federal law protects individuals with disabilities against discrimination on the basis of their disability. This protection is comparable to that extended to minority groups since 1964. It is clear that *Americans with disabilities are now a protected class.* They represent 20% of the population of the United States [43 million]. Robert L Burgdorf, Jr., *The Americans With Disabilities Act: Analysis and Implications of A Second-Generation Civil Rights Statute,* 26 Harv. Civ. Rts. L.Rev. 413, 434 (1991). See also 42 U.S.C. § 12101(a)(7).

The Supreme Court of Florida has found preemption by the ADA yet ignores that finding when the claimant raises mental illness in the context of a claim. The ADA, as a civil rights act, is intended to maximize options available to workers, thus ensuring fairness. Florida rejects those options where only mental disability is alleged.

Congress concluded that the ADA was intended to provide a national mandate for the diminution of discrimination against the disabled in all forms, to establish strong and consistent standards addressing such discrimination, and to ensure that federal agencies and courts implement Congress' intent with their broad regulatory, enforcement and interpretive powers. 42 U.S.C. § 12101(a). The ADA mandates remedies that prevent, in the future, discrimination against this discrete and insular minority. Clearly, the purposes of the ADA would be undermined by an interpretation which would in effect allow each state to supersede the ADA with its own interpretation of what illnesses are compensable. That is precisely what *Gable* has done.

If a class has experienced a "history of unequal treatment" or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities (for example, gender-based discrimination), this court has concluded in no uncertain terms, that heightened – intermediate – scrutiny is the standard for review. See, e.g., *Mississippi University of Women v. Hogan*, 458 U.S. 718, 1025 S. Ct. 3331, 73 L.Ed.2d 1090 (1982) and *United States v. Virginia*, ___ U.S. ___, 116 S. Ct. 2264, 135 L.Ed.2d 735 (1996). Congress through the ADA, agreed. The ADA mandates heightened intermediate scrutiny standards, 42 U.S.C. § 12101(a)(7) (Supp. 1990); yet, in the present case no scrutiny is contemplated. How is a mentally impaired worker to seek redress if the state courts are closed to him? This Court is his only avenue. See Cf., *Baker v. Carr*, 369 U.S. 186 (1962); and *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411 (1964).

While the Florida Supreme Court hints at the fact that the goals of workers' compensation laws are subject to valid national civil rights legislation, the Court nevertheless has ignored this axiom and in so doing, has withdrawn the impact of the ADA's equal rights mandate upon the state workers' compensation. If the courts of Florida are permitted to act in clear disregard of the ADA's mandate, then their companions in other states will also be left free to determine what are or are not disabilities. As a result, workers' compensation benefits would then be for all intents and purposes outside of ADA's control, far removed from the intent of Congress.

Congress intended that under ADA, mental depression be recognized as a disability. *Stradley v. LaFourche Communications, Inc.*, 869 F. Supp. 442, 443 (E.D. La. 1994).

The depression must actually exist or be perceived to "substantially limit . . . [a] major life activity." *Id.* In *Stradley,* an employer sought a motion to dismiss on the basis that an employee was not disabled under the ADA. *Id.* The court denied the request due to there being an issue of material fact. *Id.,* at 445. The court pronounced that the test for mental disability is "whether the impairment, as perceived, would affect the individual's ability to find work across the spectrum of same or similar jobs." *Id.* at 443, (quoting *Partlow v. Runyon,* 826 F. Supp. 40, 45 (D.N.H. 1993). See also *Pritchard v. Southern Company Services,* 92 F.3d 1130 (11th Cir. 1996).

The petitioner does not argue that all mental illnesses are automatically linked to the ADA. To be regarded as a disability, the depression must be more than a temporary situation. "According to the EEOC Technical Assistance Manual for the ADA, temporary, nonchronic impairments that do not last for a long time and that have little or no long-term impact usually are not disabilities." *Muller v. Automatic Club of Southern California,* 897 F. Supp. 1289, 1294 (S.D. Calif. 1995). In *Muller,* as a result of being verbally assaulted on the job, the plaintiff claimed that she was disabled. *Id.* at 1291. The plaintiff relied on medical proof from two psychiatric exams. *Id.* at 1295. These exams were administered at the "height" of her mental anxiety. *Id.* Yet, the defendant offered medical evidence that plaintiff's condition did improve, was temporary and did not substantially limit any major life activity. *Id.* Although the plaintiff contended that she was permanently disabled, she offered no evidence to oppose the defendant's argument. *Id.* at 1297.

The *Muller* court offered an interesting evidentiary analogy. *Id.* The court compared plaintiff's mental illness to a broken leg. *Id.* A person with a broken leg could not rely upon his x-ray, taken one week after being placed in a cast, to prove his disability. *Id.* Likewise, a person with a mental illness cannot "pick" when she would like to be examined for a disability. One cannot rely on a certain period of time that simply because it conforms to one's evidentiary needs. The court is concerned with the "permanent" and "stationary" status of the illness, not individual fluctuations of the condition. *Id.*, at 1296.

A candidate for ADA protection must prove that her mental illness "affect[s] the individual's ability to find work across the spectrum of the same or similar jobs." *Id.* at 1297 (quoting *Partlow v. Runyan*, 826 F. Supp. 40, 44 (D.N.H. 1990). It is noted that "the inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working." *Id.* at 1295 (quoting 29 C.F.R. 71630.2(j)(3)(i)). In *Partlow*, the plaintiff offered no evidence that she was not fit for other jobs within her class. *Id.* at 1297. Simply wishing not to go back to a certain type of job is not adequate. *Id.* One must demonstrate that she lacked the "skills, training, or ability" to locate a similar job. *Id.*

Ultimately, a plaintiff must prove that his mental impairment also does more than just alter his lifestyle. *Soileau v. Guilford of Maine*, 928 F. Supp. 37, 47 (D. Me. 1996). A plaintiff must identify a "major life activity" that has been impaired. *Id.* In *Soileau* it was not sufficient that the plaintiff had increased difficulty in interpersonal interaction. *Id.* at 498. Simply not being able to get along with others is not a disability. *Id.* Unless the claimant can

identify an impaired major life activity, he does not fall under the ADA umbrella. *Id.* However, Florida does not permit Petitioner to focus exclusively upon mental impairment.

CAUSATION UNDER FLORIDA'S WORKER'S COMPENSATION LAW

Fla. Stat. 440.02(1) has been held to exclude a mental or nervous injury where the injury was not caused by a physical injury to the claimant. *City of Holmes Beach v. Grace*, 598 So.2d 71 (Fla. 1992). In *Grace*, the claimant, a police officer, had been involved in an altercation with a suspect. *Id.* at 72. During the altercation, *Grace*, the claimant, was struck by the suspect. *Id.* The claimant had to leave his job due to his suffering from post-traumatic stress disorder. *Id.*

Even though claimant's illness could not be directly attributed to being struck, the District Court held in claimant's favor. *Id.* The Florida Supreme Court quashed this decision. *Id.* at 74. The court could not link *Grace's* illness to this physical injury. *Id.* The court said "that there must be an actual physical injury upon which to predicate compensation for a neurosis." *Id.* at 72. The court noticed, however, that the courts have never required that the injury be a serious one. *Id.* On the other hand, a "mere touching" is not sufficient either. *Id.* at 73. Ultimately, there must be: a) a physical injury that; b) is the "causative factor" of the neurosis. *Id.* Although a non-serious physical injury could theoretically cause a mental injury, it would be difficult to prove. *Id.* [*Grace, supra*

overrules *Prahl Bros., Inc. v. Phillips*, 429 So.2d 386 (1st DCA 1983)]. *Prahl Bros.* held that the physical injury did not have to be a disabling one. The *Prahl* claimant argued for mental injuries as a result of having a gun put to her head during a robbery. Although *Grace* overrules *Prahl*, the *Prahl* claimant may have still found relief under the *Grace* reasoning. The *Prahl* claimant would have had to build a stronger causative link between the physical ordeal and emotional trauma. Instead of relying on the robbery as an on-the-job incident, the claimant would have had to rely on the severe touching that occurred.

Grace follows the "causal connection" test that has been utilized by the Florida courts. *Superior Mill Work v. Gabel*, 89 So.2d 794 (Fla. 1956).

STATE LAW IN VIOLATION OF THE ADA

The purpose of the ADA was to stop state-mandated discrimination. *Ellen S. v. Florida Board of Bar Examiners*, 859 F. Supp. 1489, 1494 (S.D. Fla. 1994). The ADA operates through the Fourteenth Amendment and Commerce Clause. *Id.* Congress also abrogated eleventh amendment sovereign immunity for ADA claims. *Id.* The ADA's goal is " 'to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities' " *Id.* (quoting 42 U.S.C. § 12101(b)(1)). Therefore, state laws cannot conflict with the ADA.

In *T. P. v. DuBois*, residents of the Massachusetts Department of Health or State Hospital Facilities challenged a state statute. *T. P. v. DuBois*, 843 F. Supp. 775 (D.

Mass. 1993). The statute required residents of mental health facilities to contribute toward the cost of counsel appointed to provide representation for them. *Id.* The court held that this statute was a violation of the residents' right to due process and equal protection under the Fourteenth Amendment, and to freedom from discrimination on the basis of disability, as guaranteed by Title II of the Americans with Disabilities Act." *Id.* The court ordered accordingly. *Id.* at 796.

In Texas, a community mental health center's board of trustees held its meetings at 7:00 a.m., *Dees v. Austin Travis County Mental Health and Mental Retardation*, 860 F. Supp. 1186, 1187 (W.D. Texas 1994). *Dees*, an advocate for the mentally ill and a resident who suffered drowsiness as a result of mental health medication, claimed that this meeting time discriminated against her disability. *Id.* at 1187. At 7:00 a.m., *Dees* would be too drowsy to participate in these meetings. *Id.* The board offered to change the meeting time to 8:00 a.m. with additional accommodation for *Dees*. *Id.* at 1188. *Dees* did not believe that neither the time change or accommodations were sufficient. *Id.* at 1189.

The court noted that "the fundamental purpose of the ADA is to integrate the disabled into mainstream activities." *Id.* at 1191. The suggested modifications failed. *Id.* The Health Center suggested a "balancing test of competing interests," in which the interests of all parties should be weighed. *Id.* Instead, the court said the test should be "whether the modification can be made without fundamental alteration or undue burden such that disabled individuals will not be denied the equal opportunities enjoyed by others." *Id.* The Health Center did not prove

by a preponderance of the evidence that altering the schedule of meetings would violate the "integrity of the program," and *Dees* prevailed. *Id.* at 1193. The Health Center could not prove that accommodations would result in a violation of the "integrity of the program"; or a "fundamental" change in the board or services provided; or an "administrative hardship or burden." *Id.*

Consider *Pushkin v. Regents of the University of Colorado,* 658 F.2d 1372 (10th Cir. 1981), in which the plaintiff instituted an action based on the claim that he was denied admittance to a psychiatric residency program because he suffered from multiple sclerosis. An issue the court faced was what standard of review to apply when there is an alleged violation of the *Rehabilitation Act of 1973.* The court held that a higher standard than a "rational basis test" is mandated. *Id.*, at 1383. The defendant in *Pushkin* argued that their decision not to admit plaintiff to the residency program must be reviewed under equal protection standards and must, therefore, be affirmed under the rational basis test. *Id.* The court held that the rational basis test is not applicable where there is alleged violation of § 504 of the Rehabilitation Act. In its reasoning, the court stated that the standards for determining the merits of a case under § 504 are contained in the statute. *Id.* at 1384.

The court further reasoned that to ask the court to defer to a rational basis argument when analyzing a claim under § 504 is to ask the court to ignore the plain statutory language of § 504. *Id.* The court added that to apply a rational basis test would be to reduce the statute to "nothingness, which should be avoided." *Id.*

Pushkin was cited favorably in *Maine Human Rights Commission v. Canadian Pacific Ltd.*, 458 A.2d 1225 (Maine, 1983). In *Maine Human Rights Commission*, the plaintiff brought an action alleging that the defendant unlawfully discriminated against the individual plaintiffs because of their physical handicaps in violation of their rights under the *Maine Human Rights Act*. The court held that

> the 'rational relationship' test, as generally applied in minority constitutional equal protection analysis, requires only that some conceivable set of facts could rationally support the distinction above . . . [S]uch a highly deferential standard of review, is clearly inappropriate when reviewing the adequacy of an affirmative defense raised by an employer against whom a case of employment discrimination has already been established. 151 at 1231. (citing *Pushkin, supra*).

See also *Williams v. Colorado Springs School District*, 641 F.2d 835, 841 (10th Cir. 1981) (rational relationship inapplicable in gender discrimination cases under Title VII of the Civil Rights Act of 1964.)

Other Civil Rights cases have held that discrimination within a similar class presents courts with a valid cause of action, and heightened scrutiny is the standard for review. See *Walker v. Secretary of the Treasury*, 713 F. Supp. 403 (N.D. GA. 1989) and *Rodriguez v. Gattuso*, 795 F. Supp. 860 (N.D. Ill. 1992).

Not all courts agree with the rationale adopted in *Pushkin*. In *Cramer v. Florida*, 885 F. Supp. 1545 (M.D. Fla. 1995), the court held that the ADA did not apply to alleged discrimination between two disabled persons by

favoring one over another. The court, applying a rationality test, found that the Florida Workers' Compensation Statute did not violate the ADA by use of "impairment" ratings even though persons with lesser impairment ratings, thus, lower benefits, might be more disabled than persons with higher impairment ratings.

In *Muller v. Hotsy Corporation*, 917 F. Supp. 1389 (N.D. Iowa 1996) and *Hutchinson v. United Parcel Service, Inc.*, 883 F. Supp. 379 (N.D. Iowa 1995), the courts found that in an ADA case, at the prima facie case phase, a plaintiff need only make a showing that gives rise to an inference of discrimination on the basis of disability. *Muller* at 1410; *Hutchinson* at 395. The ADA defines the class of disabled persons rather than allowing employers or a state to control whom the ADA protects. *Id.*

The same arguments apply to the Florida Workers' Compensation Statute § 440.02(1), which under color of state law, permits discrimination among the members of the ostensibly protected class. Fla. Stat. 440.02(1) allows recovery for mental disabilities that are accompanied with physical injury, but denies recovery for mental disabilities that are not accompanied by physical injury. Florida courts have already created the scenario feared in *Muller* and *Hutchinson* – wherein the discrimination against one disabled person in favor of another disabled person is permitted. At the very least, there is a discrepancy between jurisdictions as to the interpretation of the ADA – whether it only applies to a disabled plaintiff versus a nondisabled person or whether, as in the Iowa cases, the ADA was intended to prohibit discrimination against the disabled regardless of whether it is in favor of a nondisabled person or a person with lesser disabilities.

In *Martin v. Voinovich*, 840 F. Supp. 1175 (S.D. Ohio 1993), a class of persons with mental retardation or development disabilities and a subclass of medicaid recipients brought an action alleging violations of civil rights under the Constitution, the Rehabilitation Act, Americans with Disabilities Act, and Developmental Disabilities Act. The defendants in *Martin* alleged that § 504 of the Rehabilitation Act did not provide relief when the discrimination was between person with different handicaps, as opposed to between handicapped person and non-handicapped persons. *Id.* at 1190. The court held that, as a matter of statutory construction, nothing in the language of § 504 suggests that it can never apply between persons with different handicaps. In its reasoning the court stated,

> The language of § 504 evinces an intention to eliminate handicap-based discrimination and segregation. A strict rule that § 504 can never apply between persons with different disabilities would thwart that goal. Such a rule would in effect, allow discrimination on the basis of disability. The relevant inquiry is whether the application of § 504 between persons with different or varying degrees of disability furthers the goal of eliminating disability-based discrimination . . . The severity of plaintiffs' handicaps is itself a handicap which, under § 504, cannot be the sole reason for denying plaintiffs access to community programs.

In a more recent case the United States District Court for Connecticut held that the regulations promulgated under both § 504 of the Rehabilitation Act and the ADA clearly prohibit discrimination based upon severity of disability. *Messier v. Southuny Training School*, 916 F. Supp.

133 (D. Conn. 1996). In *Messier* residents of a state institution for persons with mental retardation sued the institution alleging discrimination in community placement based on the severity or nature of their disabilities. *Id.* at 136. The *Messier* court noted that numerous courts have recognized that both § 504 Rehabilitation Act and the ADA prohibit discrimination on the basis of severity of a person's disability. See *Plummer v. Branstad*, 731 F.2d 574, 578 (8th Cir. 1984); and *Lynch v. Maher*, 507 F. Supp. 1268 (D. Conn. 1981) (discrimination on the basis of extent of handicap is actionable under § 504).

In *Cramer*, supra, the Court cited this Court's opinion in *Traynor v. Turnage*, 485 U.S. 535, 108 S. Ct. 1372, 99 L.Ed.2d 618 (1988), as supportive of its holding that nothing in the Rehabilitation Act requires that any benefit extended to one category of handicapped persons also be extended to all other categories of handicapped person. *Cramer, supra*, at 1152. The court in *Messier*, however, disagreed. *Messier* held that:

> The primary holding of *Traynor* was that the 1978 amendments to the Rehabilitation Act of 1973 should not be deemed to have repealed a 1977 statute which allowed for an extension of time to use veterans' benefits under certain circumstances, but only on the condition that a veteran's physical or mental disorder was not a result of willful misconduct by that veteran. The court did state in dicta that "the central purpose" of § 504 is to "assure that handicapped individuals", and that "there is nothing in [§ 504] that requires that any benefit extended to one category of handicapped persons also be extended to all other categories of handicapped

> persons." However, the circumstances underlying *Traynor* clearly show that the Court was not considering whether discrimination based upon extent of disability is generally actionable under § 504. Rather, the Court had no need to consider this question, because the regulations promulgated under § 504 provide that § 504 does not prohibit "exclusion of a specific class of handicapped persons from a program limited by federal statute or executive order to a different class of handicapped persons." This exception to § 504's coverage is clearly not applicable to the instant case.

Messier, supra, at 142, n. 7 (all internal citations omitted).

Non-ADA cases are also instructive. *Brown v. Beal,* 404 F. Supp. 770 (E.D. Pa. 1975), found that the disparate treatment of similarly situated "disabled" persons under Pennsylvania's medicaid program raised a substantial constitutional question of equal protection under the Fourteenth Amendment – whether that classification of disabled individuals rationally furthers a legitimate state interest. Also, in *Spragens v. Secretary of Health and Human Services,* 808 F. Supp. 1537 (D.Wyo. 1992), the court found that a statutory classification pursuant to which a quadriplegic suffering from erythropoiesis lost his disability benefits by having net earnings between $300 to $650 per month, while a person disabled by blindness who earned the same amount would continue to receive disability benefits, was arbitrary and discriminatory in violation of equal protection. The court stated that the disabled are a sensitive class, and when classifications involve sensitive but nonsuspect classes, the courts may engage in a more

substantial analysis of rationality. *Id.* at 1540. A classification must be reasonable and not arbitrary. Florida's classification as applied to Petitioner is arbitrary. This is not what Congress intended!

CONCLUSION

In enacting the Americans with Disabilities Act, Congress intended civil rights for disabled persons. Congress, after many false starts, enacted civil rights legislation to protect all forms of disability. In this legislation, Congress established a heightened level of scrutiny eschewing *Cleburne*'s rationality standard. Since 1990, courts in both the federal and state systems continue to disagree as to the local impact of ADA and an appropriate level of review. The entire scenario is in fact a replay of gender-based discrimination cases. See, e.g., *United States v. Virginia*, ___ U.S. ___, 116 S. Ct. 2264, 135 L.Ed.2d 1735 (1996). The same compelling reasons put forth by the United States in *United States v. Virginia, supra,* are at work in the present case.

For the reasons stated, it is respectfully submitted that the petition for a writ of Certiorari should be granted.

Respectfully submitted:

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APPENDIX 1

STATE OF FLORIDA
DEPARTMENT OF LABOR AND EMPLOYMENT
SECURITY BUREAU OF WORKERS'
COMPENSATION DISTRICT "M" NORTH

KEVIN KIENZLE,

Claimant,

vs.

ENGLEWOOD DISPOSAL and LIBERTY MUTUAL INSURANCE COMPANY,

Employer/Carrier.

_____/

CLAIM NO:
285-58-6200
D/A:
NOVEMBER 26, 1994

ORDER

At the trial of this cause, the following documents were admitted into evidence:

1. The Pretrial Stipulation sheet dated September 13, 1995, together with the documents required by Rule 4.180.

2. The Stipulation of facts and law as agreed to by the parties.

3. The transcript of the deposition of Kevin Kienzle, taken on February 3, 1995.

4. Petitions for Benefits filed February 1, 1995 and July 28, 1995.

5. Notice of Denial dated April 21, 1995.

6. Notice of Pretrial and Final Hearing date.

In making my findings of fact and conclusions of law, I have carefully considered and weighed all the evidence presented to me. Based on the foregoing and the applicable law, I make the following findings:

1. The Claimant, Kevin Kienzle, was an employee of Englewood Disposal Company, Inc., the Employer herein, on or about November 26, 1994.

2. Englewood Disposal Company had Workers' Compensation insurance coverage with Liberty Mutual Insurance Company on or about November 26, 1994.

3. The Claimant earned $10.50 per hour and worked approximately 48 hours a week for Englewood Disposal Company. Average Weekly Wage is $550.48.

4. Mr. Kienzle operated a Cushman utility vehicle to pick up garbage for the Employer.

5. The utility vehicle was a three-wheel scooter modified to haul light refuse. To the rear of the cab portion of the scooter is a bucket which extends out approximately 8 inches beyond each side of the cab.

6. On November 26, 1994, the Claimant was operating a Cushman scooter on State Road 776. He was traveling southbound at approximately thirty miles per hour.

7. As he was traveling southbound on Route 776, he observed a pedestrian walking in the bike lane of Route 776, also traveling southbound.

8. The Claimant first observed the pedestrian when he was approximately 50 to 75 yards behind him.

9. The Claimant was traveling in the southbound lane of traffic, but was moving in and out of the bike lane to allow vehicles to pass.

10. As he was passing the pedestrian, he hit the pedestrian with the bucket on the rear of the vehicle, causing fatal injuries to the pedestrian.

11. The Claimant testified in deposition that he did not suffer any physical injuries on November 26, 1994 and is not seeking benefits for any physical injury.

12. Following the November 26, 1994 incident, the claimant treated at Coastal Recovery Centers, Inc., in Venice, Florida, for psychiatric problems suffered as a result of the incident in which he struck and fatally wounded a pedestrian on November 26, 1994. In addition, the claimant was treated at Sarasota Memorial Hospital on November 30,1994 for an attempted suicide. The claimant's treatment at Coastal Recovery began after this date.

13. Following this incident, the Claimant filed a Request for Assistance and Petition for Benefits dated January 22, 1995 seeking "Temporary Total Disability benefits from the date of accident to the present and continuing; medical care and attention by a psychiatrist and psychologist." A Petition for medical bills was received July 28, 1995.

14. The Employer/Carrier filed a Notice of Denial on April 21, 1995 for the reason that there is no coverage under the Florida Workers' Compensation Statute or in the case law for the employee's claim because no physical injury was sustained. Florida Statute, section 440.02 (1)

(1994) defines "accident". This definition includes the following provision: "A mental or nervous injury due to stress, fright or excitement only . . . is not an injury by accident arising out of the employment."

15. As early as 1956 the Supreme Court of Florida applied the provision in 440.02 (1) to a claim where an employee had sustained no physical injury, and the Court held that the statute excludes from coverage matters where no physical injury has occurred. *See Superior Mill Work v. Gabel,* 89 So.2d 794 (Fla. 1956). This position has been upheld in more recent Supreme Court and 1st DCA cases. *See Richard-Greenshields Securities, Inc.,* 552 So.2d 1099 (Fla. 1989); *Arnold v. State,* 610 So.2d 585 (Fla. 1st DCA 1992). The law is clear: a claimant who suffers no physical injury is not entitled to Workers' Compensation benefits for psychiatric injuries, and compensation for such injuries will only be available if the claimant establishes that the mental or emotional injury is a direct result of a physical injury. *Nationwide v. McGee,* 597 So.2d 357 (Fla. 1st DCA 1992).

16. By the Claimant's own admission, he suffered no physical injury as a result of the incident of November 26, 1994.

17. Based on the clear language of the statute in 440.02 (1), the Supreme Court's upholding of that statutory provision, and the Claimant's testimony that there was no physical injury, it is clear that there was no accident.

18. For these reasons, the Claimant's mental, emotional and/or psychiatric injuries are not compensable.

19. In addition to seeking payment of TT benefits from date of accident to the present and continuing, as well as medical treatment with a psychiatrist or psychologist, and payment of medical bills, the Claimant asserts that the position taken by the Employer/Carrier in denying the request for medical benefits because there was no accident within the meaning of the statute, violates the Americans with Disabilities Act, 42 U.S.C. section 12101, et seq.

20. Recent state and federal case law supports the denial of this claim and upholds the Florida Workers' Compensation Act as nonviolative of the ADA. *See Barry v. Burdines and the Travelers,* 20 FLW D1923 (Fla. 1st DCA 1995) *cert. granted* August 23, 1995, and *Cramer v. State of Florida,* 885 F. Supp 1545 (M.D. Fla. 1995), *cert. granted* 1st DCA October 5, 1995.

Based on the foregoing conclusions of fact and law, this Court Orders and Adjudges as follows: The Court accepts the Employer/Carrier's position that the Claimant did not suffer an industrial accident arising out of or in the course and scope of his employment, in light of the fact that there was no accident within the meaning of *Florida Statute* section 440.02 (1) because there was no physical injury to the Claimant. In addition, the Court does recognize the current case law upholding the position taken by the Employer/Carrier as being nonviolative of the provisions of the ADA, but the JOCC is without jurisdiction to determine whether the Claimant's Americans with Disabilities Act rights have been violated.

DONE AND ORDERED in Chambers in Sarasota, Manatee County, Florida.

[SEAL]

/s/ Diane B. Beck
DIANE B. BECK
Judge of Compensation Claims
District "M" NORTH

WE HEREBY CERTIFY that the above Order was entered on this 27 day of October , 1995, and copies were sent by regular mail to the following parties:

/s/ Illegible
Assistant to the Judge
of Compensation Claims

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IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

KEVIN P. KIENZLE,

Appellant,

v.

ENGLEWOOD DISPOSAL CO., INC. and LIBERTY MUTUAL INSURANCE COMPANY,

Appellees.

CASE NO. 95-4179

_____/

Opinion filed July 18, 1996.

An appeal from an order of the Judge of Compensation Claims. Diane B. Beck, Judge.

Alex Lancaster of Lancaster & Eure, P.A., Sarasota, for Appellant.

Nancy A. Lauten of Fowler, White, Gillen, Boggs, Villareal & Banker, P.A., Tampa, for Appellees.

PER CURIAM.

AFFIRMED.

BARFIELD, C.J., KAHN and DAVIS, JJ., CONCUR.

Supreme Court of Florida
TUESDAY, AUGUST 20, 1996

KEVIN P. KIENZLE, Petitioner,	**	CASE NO. 88,746
vs.	**	District Court of Appeal 1st District – No. 95-4179
ENGLEWOOD DISPOSAL CO., INC., ET AL., Respondents.	**	

It appearing to the Court that it is without jurisdiction, the Petition for Review is hereby dismissed. *Jenkins v. State*, 385 So.2d 1356 (Fla. 1980).

No Motion for Rehearing will be entertained by the Court.

A True Copy

TEST:

Sid J. White [SEAL]
Clerk Supreme Court

H

cc: Hon. Jon S. Wheeler, Clerk
Ms. Amy L. Sergent
Ms. Nancy A. Lauten
Mr. Alex Paul Lancaster
Mr. Edward A. Dion

No. 96-720

Supreme Court, U.S.
FILED
DEC 9 1996
CLERK

In The

Supreme Court of the United States

October Term, 1996

KEVIN P. KIENZLE,

Petitioner,

vs.

ENGLEWOOD DISPOSAL CO., INC. and LIBERTY MUTUAL INSURANCE COMPANY,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Florida

RESPONDENTS' BRIEF IN OPPOSITION

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Lutz Appellate Services, inc.

LIST OF PARENT COMPANIES AND NON-WHOLLY OWNED SUBSIDIARIES

Pursuant to Supreme Court Rule 29(6), the following constitutes a list of all parent companies and non-wholly owned subsidiaries of Liberty Mutual Insurance Company and Englewood Disposal Company, Inc.:

(1) Liberty Mutual is a 25% owner of Premier Treatment and Health Centre, Inc.

(2) Liberty Mutual is a 40% owner of Liberty Mutual Bermuda, Ltd.

(3) Liberty Mutual is a 42% owner of St. James Court, Ltd.

(4) Liberty Mutual is a 19.5% owner of Stuart Ins. Company.

(5) Liberty Mutual has numerous other wholly owned subsidiaries.

(6) There is no parent company or non-wholly owned subsidiaries of Englewood Disposal Co., Inc.

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Supreme Court Rule 13	2
Other Authorities Cited:	
29 C.F.R. § 1630.2(i)	12
29 C.F.R. § 1630.2(j)	13

STATEMENT OF JURISDICTION

This Court does not have jurisdiction to review this case because the Petition for Writ of Certiorari was untimely. This Court also cannot properly exercise jurisdiction over this case pursuant to 28 U.S.C. § 1257(a), because the principle question presented for review was never presented to the Florida courts. These newly presented arguments, therefore, may not properly be considered.

STATEMENT OF THE CASE

Respondents respectfully oppose the Petition for Writ of Certiorari. Respondents also respectfully correct a couple of misstatements contained in the Petitioner's Statement of the Case. First, contrary to the Petitioner's claim that he "had an on-the-job-accident which resulted in psychiatric disabilities," *no* evidence was presented in the proceedings below establishing that the Claimant/Petitioner had a mental impairment and resulting psychiatric disabilities. Second, the Supreme Court of Florida did not deny certiorari in this case; rather, the court noted that it was without jurisdiction and dismissed the petition for review. This crucial distinction affects this Court's jurisdiction as discussed below.

REASONS FOR DENYING THE WRIT

I.

THIS COURT LACKS JURISDICTION TO CONSIDER THE PETITION BECAUSE IT WAS UNTIMELY.

The Petitioner, Kevin Kienzle, is asking this Court to exercise its discretionary certiorari jurisdiction to review a July 18, 1996 decision issued in a workers' compensation matter by the First District Court of Appeal of Florida. As the foundation

for jurisdiction in this Court, he claims the Supreme Court of Florida denied his timely petition for certiorari on August 20, 1996. Thus, he no doubt believes that the instant petition, served on November 5, 1996, and filed with the court on November 6, 1996, is timely. That belief is erroneous.

Pursuant to Supreme Court Rule 13, a petition for writ of certiorari to review a judgment in any civil case entered by a state court of last resort

> is timely when it is filed with the Clerk of this Court within 90 days after entry of the judgment. A petition for a writ of certiorari seeking review of a judgment of a lower state court that is subject to discretionary review by the state court of last resort is timely when it is filed with the Clerk of this Court within 90 days after entry of the order denying discretionary review.

Unless a petition for rehearing is sought in the lower court, the time to file a petition for writ of certiorari "runs from the date of entry of the judgment or order sought to be reviewed, and not from the issuance date of the mandate (or its equivalent under local practice)." Supreme Court Rule 13. The ninety-day time limit for filing a petition for writ of certiorari in a civil case is *mandatory* and *jurisdictional*. *See* 28 U.S.C. § 2101(c). *See also Federal Election Commission v. NRA Political Victory Fund*, __ U.S. __, 115 S. Ct. 537, 539 (1994). If that deadline is not met, this Court has no "authority to extend the period for filing except as Congress permits," and must dismiss the petition for certiorari for want of jurisdiction. *Id.* at 544-45.

In this case, the date of entry of the judgment or order sought to be reviewed is July 18, 1996, the date of the First District

Court of Appeal's decision. No motion for rehearing was sought by the Petitioner in that court. Instead, the Petitioner filed a "notice of appeal" dated August 12, 1996, seeking review of the July 18, 1996 order by the Supreme Court of Florida. The notice of appeal recited that the "Supreme Court has jurisdiction over this matter pursuant to Rule of Appellate Procedure 9.030 (a) (2) (A) (i) and (iv)." Those provisions grant the Supreme Court of Florida discretionary review over decisions of district courts of appeal that "(i) *expressly* declare valid a state statute; . . . (iv) *expressly* and directly conflict with a decision of another district court of appeal or of the supreme court on the same question of law" (emphasis added). The question then becomes whether the judgment of the First District Court of Appeal was a judgment that was subject to discretionary review by the Supreme Court of Florida, so as to start the 90 day clock running on August 20, 1996, or whether the decision of the First District was in fact the judgment of the state court of last resort, so as to commence the running of the 90 day jurisdictional time period on July 18, 1996.

In dismissing the petition for review in this case, the Supreme Court of Florida cited *Jenkins v. State*, 385 So. 2d 1356 (Fla. 1980). In *Jenkins*, the decision sought to be reviewed was a district court of appeal decision which read in its entirety "Per Curiam Affirmed," but was also accompanied by a dissenting opinion. The question before the court was whether it had jurisdiction to review the matter. The court held that it did not. In reaching that conclusion, the court analyzed the history of the review process in Florida and the affect on that process by a 1980 amendment to the Florida Constitution. Prior to the amendment, the Supreme Court of Florida had jurisdiction to review by certiorari "any decision of a district court of appeal . . . that is in direct conflict with a decision of any district court of appeal or of the supreme court on the same question of law." 385 So. 2d at 1357. As a result, the court had often granted

review based on dissenting opinions, even though the majority decision was rendered without opinion. *Id.* at 1358.

After April 1, 1980, the state constitution was amended with respect to review of conflicting decisions as follows:

> May review any decision of a district court of appeal . . . that *expressly* and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law. . . .

Jenkins, 385 So. 2d at 1357 (emphasis in original). The court found that the revised language left no room for doubt that it could only "review a decision of a district court of appeal that *expressly* and directly conflicts with a decision of another district court of appeal or the Supreme Court on the same question of law." *Id.* at 1359 (emphasis in original). The court noted that the single word "affirmed" comported with none of the definitions of the term "express," and further noted that the "language and expressions found in a dissenting or concurring opinion cannot support jurisdiction under section 3(b)(3) because they are not the *decision* of the district court of appeal." *Id.* Accordingly, the court held that after April 1, 1980,

> the Supreme Court of Florida lacks jurisdiction to review per curiam decisions of the several district courts of appeal of this state rendered without opinion, regardless of whether they are accompanied by a dissenting or concurring opinion, when the basis for such review is an alleged conflict of that decision with a decision of another district court of appeal or of the Supreme Court.

Jenkins v. State, 385 So. 2d at 1359. *See also Jollie v. State*, 405 So. 2d 418 (Fla. 1981) (mere citation per curiam affirmed decision rendered in traditional form will remain non-reviewable by Supreme Court); *St. Paul Title Ins. Corp. v. Davis*, 392 So. 2d 1304 (Fla. 1980) (all writs provision of state constitution cannot be used to circumvent ruling that court lacks jurisdiction to review per curiam decisions of district courts of appeal).

Also instructive is *The Florida Star v. B.J.F.*, 530 So. 2d 286 (Fla. 1988). There, this Court certified a question regarding the state court's subject matter jurisdiction over the newspaper's appeal. At issue was which decision constituted the final decision of the highest state court empowered to review the matter for purposes of timely review in this Court: the decision of the district court of appeal, or the supreme court's order summarily denying discretionary review? The Florida court ruled that even though it had ultimately denied review, complete subject matter jurisdiction over the case had nevertheless existed

> to hear *B.J.F.* and decide the case on its merits with finality. This jurisdiction must be regarded as complete until the time the petition for review was denied. Moreover, the denial of review in *B.J.F.* did not operate to deprive this Court of its subject-matter jurisdiction retroactively, but merely constituted the point in time at which jurisdiction, for whatever reason, had ended.

530 So. 2d at 289. Relevant here, however, is the Supreme Court of Florida's specific recognition that it *did not* have

> subject-matter jurisdiction over a district court opinion that fails to expressly address a question of law, such as opinions issued

> without opinion or citation. Thus, *a district court decision rendered without an opinion or citation constitutes a decision from the highest state court empowered to hear the cause*, and an appeal may be taken directly to the United States Supreme Court.

The Florida Star, 530 So. 2d at 288 n. 3. (emphasis added).

Applying the above-cited principles to this case shows that the First District Court of Appeal's July 18, 1996 decision constituted the decision "from the highest state court empowered to hear the cause." Therefore, Mr. Kienzle was required to seek review in this Court directly from the July 18, 1996 decision. That means that in order to be timely, his petition for writ of certiorari had to be filed with this Court within 90 days, or by October 16, 1996. Since the petition was not filed with the clerk until November 6, 1996, it is untimely. This defect is fatal and leaves the court with no choice but to dismiss the petition for certiorari for want of jurisdiction. *Federal Election Commission v. NRA Political Victory Fund*, __ U.S. __, 115 S. Ct. 537 (1994).

II.

MR. KIENZLE HAS NOT SHOWN ANY GROUNDS FOR THIS COURT TO GRANT HIS PETITION FOR WRIT OF CERTIORARI IN THIS MATTER.

Even if this Court could somehow find the petition is timely, jurisdiction should still be denied. Pursuant to Supreme Court Rule 10, review "on a writ of certiorari is not a matter of right," but is committed to the absolute discretion of this Court. Therefore, such review will only be granted for the most compelling reasons. Among those reasons are that:

> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> (c) a state court . . . has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Supreme Court Rule 10.

Although less than clear, Mr. Kienzle is apparently claiming that the Court should exercise its certiorari jurisdiction in this case because the First District Court of Appeal's decision conflicts with decisions of other state and federal courts. More specifically, he claims that Florida courts have already:

> created the scenario feared in *Muller* and *Hutchinson* — wherein the discrimination of one disabled person in favor of another disabled person is permitted. At the very least, there is a discrepancy between jurisdictions as to the interpretation of the ADA — whether it applies only to a disabled plaintiff versus a non-disabled person or whether, as in the Iowa cases, the ADA was intended to prohibit discrimination against the disabled regardless of whether it is in favor of a non-disabled person or a person with lesser disabilities.

(Petition at p. 22).

As shown by the decision sought to be reviewed, the First District Court of Appeal did not issue a written opinion. Instead, the court issued a per curium affirmance or PCA. Florida courts uniformly hold that such decisions have no precedential value, for they do not establish any point of law. That is because the courts recognize there "is no presumption that the affirmance was on the merits," and further, that the "rationale and basis for the decision without opinion is always subject to speculation." *Department of Legal Affairs v. District Court of Appeal, 5th District*, 434 So. 2d 310, 311-12 (Fla. 1983). Such uncertainty, therefore, "in itself negates a basis for reliance on an unwritten decision for guidance or precedence." *Id.* at 321.

Moreover, as explained above, the Supreme Court of Florida has ruled that it has no jurisdiction to review a PCA decision of a district court of appeal because such a decision can in no way be said to expressly and directly conflict with a "decision of another district court of appeal or the Supreme Court on the same question of law." *Jenkins v. State*, 385 So. 2d 1356, 1359 (Fla. 1980). In other words, it amounts to nothing more than pure speculation as to whether or not an appellate court in Florida, when issuing a PCA decision, has even reached, let alone ruled upon, the merits of the claims asserted by the parties.

In this case, it is nothing more than pure speculation for the Petitioner to claim that the First District Court of Appeal's decision has in any way created or announced a rule of law that conflicts with opinions of other state and/or federal courts, one that will influence other courts to rule the same way, or one that has decided such an important question of federal law that should be settled by this Court. The court announced nothing but "affirmed." Such a pronouncement falls far short of the compelling reasons this Court considers when exercising its judicial discretion. This Court should not accept certiorari jurisdiction in this matter, and Mr. Kienzle's petition should be denied.

III.

THIS COURT HAS NO JURISDICTION TO CONSIDER MOST OF PETITIONER'S ARGUMENTS.

This Court prudently declines to review judgments rendered by the highest court of a state unless a federal question has been both raised and decided in the state court below. *See, e.g., Yee v. City of Escondido*, 503 U.S. 519 (1992) (in reviewing judgments of state courts pursuant to 28 U.S.C. § 1257, the court will refuse to consider claims that were not raised or addressed below); *Beck v. Washington*, 369 U.S. 541 (1962) (because petitioner failed to argue equal protection in state court, question was not before this Court).

The law in Florida is consistent with federal law; that is, arguments not presented to the lower court cannot be raised for the first time on appeal. Florida courts take it a step further, and also prohibit a party from raising new issues in a reply brief, at oral argument, or in a motion for rehearing. *See, e.g., J.A.B. Enterprises v. Gibbons*, 596 So. 2d 1247 (Fla. 4th DCA 1992); *Taylor v. Johnson*, 581 So. 2d 1333 (Fla. 1st DCA 1990); *Polyglycoat Corp. v. Hirsch Distributors, Inc.*, 442 So. 2d 958 (Fla. 4th DCA 1984).

Turning to this case, this Court should deny the petition for writ of certiorari because the arguments advanced by Mr. Kienzle were never properly presented to the First District Court of Appeal of Florida. In the petition submitted to this Court, Mr. Kienzle focuses on the issue of whether Florida law violates Title II of the Americans with Disabilities Act with respect to workers' compensation coverage for "mental disabilities." His arguments, although once again less than clear, are premised on his claim that Title II of the Act prohibits states, such as Florida, from discriminating against individuals with disabilities, and

that not only is no disparate treatment allowed between groups of disabled, but the ADA mandates application of a heightened level of scrutiny when reviewing such matters, rather than simply a rational basis test or the "no scrutiny" test he claims occurred in this case. He also contends that the decisions of the state supreme court (and presumably the district court of appeal which issued the PCA in question)[1], and the definition of the term "accident" contained in § 440.02(1), Fla. Stat. (1994 Supp.), permit "discrimination among the members of the ostensibly protected class" (Petition at p. 22), which requires this Court to resolve the matter.

Although not mentioned by the Petitioner, in the proceedings before the First District Court of Appeal, Mr. Kienzle's initial and reply briefs asserted the following issue: "WHETHER SECTIONS 440.02(1) and 440.09, FLORIDA STATUTES (1993) IS SUBJECT TO AND COMPORTS WITH THE REQUIREMENTS OF TITLE I OF THE AMERICANS WITH DISABILITIES ACT?" The arguments in the Petitioner's appellate briefs and the Respondent's answer brief were solely addressed to the parties' respective positions on that specific issue. Title II of the Act was not raised or addressed. Even at the video-teleconferencing oral argument before the First District, it was the Petitioner's opening position that the Florida Workers' Compensation Act violated Title I of the ADA. It was not until the rebuttal portion of Mr. Kienzle's oral argument that counsel even brought up Title II of the ADA. At that point, Judge Davis, speaking for the court, reminded counsel of the issue that had been raised in the briefs (Title I), and advised him that it was inappropriate and far to late in the proceedings to inject a new issue. Because the issue Mr. Kienzle asks this Court to resolve was never raised below and, therefore, not ruled on by

1. Note that the judge of compensation claims did not have jurisdiction to consider or rule on the ADA assertions. *See B&B Steel Erectors v. Burnsed*, 591 So. 2d 644 (Fla. 1st DCA 1991).

the state appellate court, this Court should decline his invitation to do so at this late date.

IV.

THE PETITIONER LACKS STANDING TO ASSERT A TITLE I ADA VIOLATION.

Finally, and out of an abundance of caution, the Respondents will reiterate the position they asserted below with respect to Mr. Kienzle's challenge to the Florida Workers' Compensation Act based on Title I of the ADA. The gist of that argument is that Mr. Kienzle lacks standing to assert such a challenge. This argument is presented with the caveat that because the First District Court of Appeal issued a PCA decision, it is pure speculation whether or not the court even reached the merits of the case, as was discussed in the previous section.

In order to state a cause of action under the Americans with Disabilities Act, the complaining party must show that he (1) is disabled as defined under the ADA; (2) is qualified, with or without reasonable accommodation, to perform the essential functions of the job at issue; (3) was terminated or denied certain employment benefits, for which he was otherwise eligible, by a covered entity; and (4) such termination or denial of benefits was based upon a disability. *Harding v. Winn-Dixie Stores, Inc.*, 907 F. Supp. 386, 389-90 (M.D. Fla. 1995). As each of these elements must be proven, the failure of a plaintiff to establish one element will defeat his entire claim. *Id.*

Courts interpreting the ADA, "have found that only persons with disabilities who are "qualified" for the position they hold or desire may state a claim for discrimination under the Act." *Parker v. Metropolitan Life Ins. Co.*, 875 F. Supp. 1321, 1326 (W.D. Tenn. 1995), *affirmed in part, reversed in part*, 99 F.3d

181 (6th Cir. 1996). As a first step, the complainant must establish that he is "a qualified individual with a disability." The ADA defines the term "disability" as (1) a physical or mental impairment that substantially limits one or more of the major life activities of such individual. Included are such things as walking, speaking, breathing, performing manual tasks, seeing, hearing, caring for oneself, and working. 29 C.F.R. § 1630.2(i); (2) a record of such impairment; or (3) being regarded as having such an impairment. 42 U.S.C. § 12102(2); *Harding v. Winn-Dixie Stores, Inc.*, 907 F. Supp. at 390. Furthermore, a "qualified individual with a disability" is a disabled individual "who, with or without reasonable accommodation, can perform the essential functions of the employment position the individual holds or desires, and who meets the eligibility requirements for the receipt of services of which he is being allegedly unfairly denied." 907 F. Supp. at 390.

A recent decision involving an ADA challenge to the Florida Workers' Compensation Act recognized "that there is case authority for dismissing a case where the plaintiff essentially admits that he cannot perform the essential functions of the position." *Cramer v. State*, 885 F. Supp. 1545, 1550 (M.D. Fla. 1995). One such case, *Parker v. Metropolitan Life Ins. Co., supra*, while finding that it might seem undesirable and "perhaps unpalatable that a totally disabled individual is not entitled to relief under Title I of the ADA," nevertheless held that the plain language of the Act clearly indicated "that the ADA was designed to afford relief only to those individuals with disabilities that can perform the essential functions of the job that they hold or seek." 875 F. Supp. at 1326. The court found that:

> A review of the legislative history of Title I also supports the conclusion that this portion of the statute seeks to prohibit discrimination only against qualified individuals with

> disabilities. Thus, although plaintiff have been "qualified" to perform the essential functions of her job at the time of her enrollment in the plan, she has not shown that she was a "qualified individual *with a disability*" at that time. Thus, plaintiff is not a "qualified individual with a disability" as defined by Title I of the Act, and plaintiff does not have standing to sue under Title I of the ADA.

Id. (footnotes omitted; emphasis in original). *See also Cramer v. State*, 885 F. Supp. at 1550 (questioning, though not deciding, whether plaintiffs were qualified individuals with a disability since at the date they applied for workers' compensation benefits and were denied, plaintiffs alleged they were not capable of performing their jobs).

In this case, Mr. Kienzle failed to show that he had standing to raise the instant ADA challenge. First, he did not show that he had an impairment which "substantially limits a major life activity." There was no evidence, medical or otherwise, in the record establishing whether the Claimant's alleged mental "disability" impacted his life to the degree that it constituted a disabling impairment, or whether it was a "temporary, non-chronic impairment of short duration, with little or no long term or permanent impact," which would not be considered a disability under the Act. *See* 29 C.F.R. § 1630.2(j). In the absence of such a showing, Mr. Kienzle did not fall within the protections of the ADA.

Even if the Petitioner could be considered an individual with a "disability," there was no showing that he was a "qualified individual with a disability within the meaning of the ADA." *Cramer v. State*, 885 F. Supp. at 1550. In other words, Mr.

Kienzle did not show that he was otherwise qualified for the job he held prior to the alleged disability; that is, that he was an individual with a disability who could perform the essential functions of the job that he held or sought. Indeed, at the time that Mr. Kienzle applied for workers' compensation benefits, and they were denied, he alleged that he was temporarily and totally disabled, and apparently not capable of performing his job. Because the ADA was designed to afford relief *only* to those individuals who can perform the essential functions of the job that they hold or seek, Mr. Kienzle was not a "qualified individual with a disability" as defined by Title I of the ADA. Therefore, he did not have standing to bring this challenge and this Court should deny the requested relief. *See Kennedy v. Applause, Inc.*, 90 F.3d 1477 (9th Cir. 1996); *Gonzales v. Garner Food Services, Inc.*, 89 F.3d 1523 (11th Cir. 1996); *Parker v. Metropolitan Life Ins. Co.*, 875 F. Supp. at 1326; *Cramer v. State*, 885 F. Supp. at 1550. *See also Tyndall v. National Educ. Centers*, 31 F. 3d 209 (4th Cir. 1994); *Cheatwood v. Roanoke Industries*, 891 F. Supp. 1528 (N.D. Ala. 1995); *Ethridge v. State of Alabama*, 860 F. Supp. 808 (M.D. Ala. 1994).

CONCLUSION

For all the foregoing reasons, the writ of certiorari should be dismissed, or alternatively, denied.

Respectfully submitted,

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